STATE OF MICHIGAN

COURT OF APPEALS

In re CHRISTIE/VISOTSKI, Minors.	UNPUBLISHED January 22, 2015 No. 322583 Osceola Circuit Court Family Division LC No. 12-004945-NA
In re VISOTSKI, Minors.	No. 322584 Osceola Circuit Court Family Division LC No. 12-004945-NA

Before: RIORDAN, P.J., and MARKEY and WILDER, JJ.

PER CURIAM.

Respondents appeal as of right the trial court order terminating their parental rights to five minor children (born in 2009, 2010, 2011, 2012, and 2013, respectively)[1] under MCL 712A.19b(3)(c)(*i*) (conditions that led to termination continue to exist), (c)(*ii*) (other conditions now exist), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood child will be harmed). We affirm.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Respondents contend they were denied the effective assistance of counsel based on several alleged errors.[2] Because respondents did not preserve this issue below, this Court's

[1] Respondent father was not the biological father of the oldest child. At the time of the termination hearing in 2014, respondent mother was pregnant with her sixth child.

[2] On appeal, respondents offer several broad, conclusory allegations regarding counsel's failure to bring forth relevant evidence or failure to cross-examine witnesses thoroughly. However, many of these statements are general allegations, without specific details that would enable us to

review is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

B. LEGAL STANDARDS

The right to due process guarantees assistance of counsel in child protective proceedings. Thus, the principles of effective assistance of counsel developed in the context of criminal law apply in child protective proceedings. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). "Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *Id.*

C. ALLEGED ERRORS

Respondents first contend that their counsel violated objective standards of reasonableness in failing to object to the testimony of a child and family therapist—JoCindee Sawaquat—who testified at review hearings on September 23, 2013, and March 17, 2014, and whose report was admitted at the termination hearing. Respondents contend that Sawaquat's testimony was inadmissible under MRE 701 because she was not a qualified expert. "However, the rules of evidence do not apply at the dispositional phase of the proceeding. Instead, all relevant and material evidence . . . may be received and may be relied on to the extent of its probative value, even though such evidence may not be admissible at trial." *In re Gilliam*, 241 Mich App 133, 136-137; 613 NW2d 748 (2000) (quotation marks and citation omitted); MCR 3.975(E); MCR 3.973(E); MCR 3.977(H)(2).

MRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See also *In re Dearmon*, 303 Mich App 684, 696; 847 NW2d 514 (2014). Sawaquat's testimony was both relevant and material to the proceedings below. At the September 23rd review hearing, Sawaquat testified that the children were exhibiting signs of Reactive Attachment Disorder (RAD) and Post Traumatic Stress Disorder (PTSD), and that continued visitation with respondents was inadvisable. At the March 17th review hearing, Sawaquat testified that respondents were not making sufficient efforts to address the special needs of their children. Overall, Sawaquat testified about the children's mental and emotional needs, respondents' interactions with the children, and respondents' lack of progress in demonstrating appropriate parenting skills. Because Sawaquat's testimony was relevant and material to the proceedings below, it was admissible. "An attorney does not have a

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analyze a claim. See *Matter of Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992) ("A party may not merely announce his position and leave it to us to discover and rationalize the basis for his claim."). We only address properly presented arguments.

duty to make a meritless argument." *People v Woolfolk*, 304 Mich App 450, 457; 848 NW2d 169 (2014).[3]

Relatedly, respondents contend that their counsel was ineffective for failing to produce sufficient evidence to contradict petitioner's case. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel. *People v Mitchell*, 454 Mich 145, 163-164; 560 NW2d 600 (1997). Further, "a court may take judicial notice of its own files and records" in a termination hearing. *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009).

While respondents suggest that counsel should have countered Sawaquat's testimony with expert testimony, the decision regarding what evidence to produce is presumed to be a matter of trial strategy. *Mitchell*, 454 Mich at 163-164. Although respondents clearly desire to discredit Sawaquat, there is nothing on the record to suggest that she was biased or lying about her observations of the children and respondents. It is mere speculation to conclude that any expert would have testified contrary to Sawaquat's assessment. Respondents have not overcome the presumption that defense counsel's decision regarding what evidence to present was reasonable. *Id.*

Moreover, the thrust of respondents' argument seems to be that counsel should have reintroduced or emphasized several documents—such as bond assessments, trauma reports, allergy reports, and visitation reports—that would have undermined Sawaquat's assessment and other damaging information. However, the evidence respondents cite to on appeal is part of the court record.[4] The trial court took judicial notice of the file when rendering its decision to terminate respondents' parental rights. The trial court also engaged in a lengthy review of the record and issued a detailed opinion before rendering its decision. This was not a case where the trial court simply terminated parental rights after listening to brief and limited testimony at the termination hearing. Respondents do not explain how counsel's decision—to not reintroduce evidence already before the court—was somehow objectively unreasonable.

D. OUTCOME DETERMINATIVE

Furthermore, respondents have not demonstrated that any of these alleged errors affected the outcome of the proceedings. *Swain*, 288 Mich App at 643. Even considering the evidence respondents highlight on appeal, we find there was sufficient evidence to terminate respondents'

[3] To the extent that the trial court terminated respondents' rights based on an additional ground added after the adjudication, the court did not rely on Sawaquat's testimony for its ruling. Furthermore, as discussed *infra*, sufficient evidence was adduced to terminate respondents' rights pursuant to MCL 712A.19b(3)(g), and "[i]t is only necessary for the DHS to establish by clear and convincing evidence the existence of one statutory ground to support the order for termination of parental rights." *In re Frey*, 297 Mich App 242, 244; 824 NW2d 569 (2012).

[4] To the extent that respondents rely on evidence outside of the lower court record, our review is limited to mistakes apparent on the record. *Snider*, 239 Mich App at 423.

parental rights. "Termination of parental rights is appropriate where the petitioner proves by clear and convincing evidence at least one ground for termination." *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004).

The court properly terminated respondents' parental rights pursuant to MCL 712A.19b(3)(g), which provides: "The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." "A parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child proper care and custody." *In re White*, 303 Mich App 701, 710; 846 NW2d 61 (2014). Further, evidence that a parent cannot provide suitable housing establishes a lack of proper care or custody. *In re Trejo*, 462 Mich 341, 362-363; 612 NW2d 407 (2000). A parent's willingness to allow a known sex offender near his or her children also supports termination under MCL 712A.19b(3)(g). *In re Archer*, 277 Mich App 71, 75; 744 NW2d 1 (2007).

At the termination hearing in April 2014, the foster care worker testified that the home respondents lived in with the children was in a very deplorable and unlivable condition. The children were dirty; they did not have a safe area to sleep, and there were "hardcore porn videos in view [and] in reach of the children." Respondent mother also admitted that the children were allowed to be around a registered sex offender.

This situation was not improved at the time of the termination hearing. The foster care worker performed a scheduled visit on March 13, 2014, and found the home filled with significant safety hazards. It was 12 degrees inside the home; there were boxes and bags everywhere, as well as fish hooks, rusty items, and dirty dishes all across countertops. There was no running water in the sinks, and respondents were using a bucket to go to the bathroom. The only source of running water was the bathtub, but there was no hot water. There were no mattresses for the children. Furthermore, respondents had not paid rent since January 2013. The foster care worker indicated that respondents did not obtain housing assistance because they did not want neighbors and wanted to keep pets.

Neither respondent currently had income, and they maintained only sporadic and insufficient employment throughout the proceedings. According to respondent mother, respondent father was incarcerated, and she could not find a job on a farm to support the children because of allegations regarding animal cruelty. Respondent mother admitted that she was not in a position to support the children financially, and that she recently allowed her public food assistance to lapse.

Although respondents participated in some counseling, the foster care worker testified that they tended to shift blame to each other and exhibited anger toward one another. The foster care worker also testified that although respondents were supposed to attend six parenting classes, respondent mother completed only four, and respondent father completed three. Nor did they attend all visitation sessions. The foster care worker also testified that respondents had difficulty identifying safety concerns. She explained that despite respondents' involvement in these proceedings, "they still haven't been able to make it beyond just the very basics of parenting."

The trial court also properly found that termination was in the children's best interests. Respondents assert that their counsel should have emphasized evidence that the children's foster homes were not ideal. Even considering the evidence respondents highlight, we find no error in the best interest determination. "In deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home[.]" *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (internal citations omitted).

The court relied on numerous factors for its best interest determination, including that respondents were not bonded with the children. The court took note of the children's behavioral problems after entering care and respondents' "poor judgment and little insight into their appropriate parental roles." The court also found that respondents prioritized their own desires over the safety of their children, leaving them with inappropriate caregivers. The court found that respondents' displayed an inability to maintain employment and proper housing, to avoid criminal involvement, and they had made little progress in the areas of concern.

On appeal, respondents merely highlight evidence favorable to them while minimizing the evidence favoring termination. They ignore or discount evidence regarding their lack of adequate housing, lack of employment, criminal history, refusal to take mental health medications, failure to attend all visitation sessions, failure to significantly improve their parenting skills, and their seeming indifference to exposing their children to a known sex offender.

In light of the overwhelming evidence supporting the grounds for termination, MCL 712A.19b(3)(g), and that termination was in the children's best interests, MCL 712A.19b(5), respondents have not demonstrated that any error of counsel's affected the outcome of the proceedings.

II. CONCLUSION

Respondents were not denied the effective assistance of counsel. We have reviewed all claims in respondents' briefs and find them to be without merit. We affirm.

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ Kurtis T. Wilder